Ong Ah Tang @ Tan Ah Soo (f) & Anor v Soh Bee Yong (suing as the executor of the estate of Soh Kim Siah @ Soh Kee Lin, deceased)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–862 OF 2007
LOW HOP BING, ABU SAMAH AND AZIAH ALI JJCA
14 FEBRUARY 2011

Civil Procedure — Judgments and orders — No reason given for granting of order — Administrators of deceased's estate applied for estate lands to be sold by public auction — Majority of beneficiaries in support — Court dismissed application and ordered lands to be sold to co-administrator at specific price — No evidence at time of making order to determine best possible price for lands — Whether order unsustainable — Whether order contrary to wishes of majority beneficiaries and beyond scope of administrators' application

The appellants and the respondent were joint administrators of the estate of a deceased person pursuant to letters of administration granted to them by the High Court. The first appellant was the deceased's wife while the second appellant and the respondent were his children. A dispute arose over the fate of two pieces of land ('the lands') under the estate to which the parties had beneficial interest. The appellants wanted to sell the lands by way of public auction and distribute the proceeds of the sale among the beneficiaries in accordance with the Distribution Act 1958. The appellants claimed they had received a verbal offer of RM713,510 for purchase of the lands. The respondent, who had been in occupation of the lands for years, opposed the move and expressed his keenness to buy the lands for a total RM480,000, which was above their market value then. Not agreeable to that suggestion, the appellants applied to the High Court for an order that the lands be sold by way of public auction. Six other children of the deceased consented to the application while two adopted children, who were also beneficiaries under the estate, neither consented to nor opposed the application. The High Court dismissed the application holding there was no proof of an offer to buy the lands at RM713,510. The court instead ordered the lands to be sold to the respondent for RM480,000 and the sale proceeds to be divided among the beneficiaries. Contending there was no basis for such an order, the appellants appealed to the Court of Appeal against the decision.

Held, allowing the appeal with costs, setting aside the High Court's order and ordering the lands to be sold by way of public auction:

(1) The High Court's order was legally unsustainable. It was contrary to the

relief sought by the appellants and against the wishes of the majority of the beneficiaries who supported the application for the lands to be sold by public auction (see para 10).

(2) There was no evidence before the High Court to determine the best possible price at the time of making of the order. There was no averment in the respondent's affidavit in opposition that the lands be sold to him at RM480,000. He had merely urged the court to dismiss the appellants' application (see para 10).

(3) The court clearly went beyond the scope of the appellants' application in ordering the lands to be sold to the respondent after having dismissed the appellants' application (see paras 9–10).

[Bahasa Malaysia summary

Perayu-perayu dan responden adalah pentadbir bersama estet si mati berikutan surat kuasa mentadbir yang diberikan kepada mereka oleh Mahkamah Tinggi. Perayu pertama adalah isteri si mati sementara perayu kedua dan responden adalah anak-anaknya. Pertikaian berbangkit terhadap nasib dua bidang tanah ('tanah-tanah') di bawah estet di mana pihak-pihak mempunyai kepentingan benefisial. Perayu-perayu hendak menjual tanah-tanah tersebut melalui lelongan awam dan mengagihkan keuntungan jualan di antara benefisiari-benefisiari mengikut Akta Pengagihan 1958. Perayu-perayu menuntut yang mereka telah menerima tawaran lisan sebanyak RM713,510 untuk belian tanah-tanah tersebut. Responden, yang bertahun-tahun menghuni tanah-tanah tersebut menentang jualan tersebut dan menyuarakan kesungguhannya untuk membeli tanah-tanah tersebut bagi jumlah keseluruhan sebanyak RM480,000, yang mana adalah lebih daripada nilai pasaran mereka. Tidak bersetuju dengan cadangan tersebut, perayu-perayu memohon kepada Mahkamah Tinggi untuk perintah bahawa tanah-tanah tersebut dijual melalui lelongan awam. Enam anak si mati yang lain bersetuju dengan permohonan tersebut sementara dua anak angkat, yang juga benefisiari-benefiasiari di bawah estet tersebut, menyatakan persetujuan mahupun menentang permohonan tersebut. Mahkamah Tinggi menolak permohonan tersebut dengan memutuskan tidak terdapat bukti tawaran untuk membeli tanah-tanah tersebut pada harga RM713,510. Mahkamah sebaliknya memerintahkan tanah-tanah tersebut dijual kepada responden pada harga RM480,000 dan keuntungan jualan diagihkan di antara benefisiari-benefisiari. Berhujah bahawa tiada asas untuk perintah sedemikian, perayu-perayu merayu ke Mahkamah Rayuan terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos, mengenepikan perintah Mahkamah Tinggi dan mengarahkan tanah-tanah tersebut dijual melalui lelongan awam:

(1) Perintah Mahkamah Tinggi dari segi undang-undang tidak kukuh. Ia

bertentangan kepada relief yang dipohon oleh perayu-perayu dan bertentangan hasrat majoriti benefisiari-benefisiari yang menyokong permohonan untuk tanah-tanah tersebut dijual melalui lelongan awam (lihat perenggan 10).

(2) Tidak terdapat keterangan di hadapan Mahkamah Tinggi untuk menentukan harga terbaik mungkin pada masa membuat perintah tersebut. Tidak terdapat hujahan di dalam afidavit menentang responden bahawa tanah-tanah tersebut dijual kepadanya pada harga RM480,000. Responden hanya mendesak mahkamah untuk menolak permohonan perayu-perayu (lihat perenggan 10).

(3) Mahkamah jelas melampaui skop permohonan perayu-perayu dalam mengarahkan tanah-tanah tersebut dijual kepada responden selepas menolak permohonan perayu-perayu (lihat perenggan 9–10).]

Notes

For a case on no reason given for granting of order, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 4632.

Cases referred to

Ong Thye Peng v Loo Choo Teng & Ors [2008] 4 MLJ 31; [2008] 1 CLJ 571, FC (refd)

Yap Yoke Luan & Ors v Ong Wee Tok & Ors [1984] 1 MLJ 23; [1983] CLJ (Rep) 433, FC (refd)

Legislation referred to

Distribution Act 1958
National Land Code Form 14A
Probate and Administration Act 1959 s 60(2), 60(4)(a)

Appeal from: Originating Summons No 24(L)–535 of 2005 (High Court, Muar)

Kee Tong Kiat (Chee Siah Lee Kee & Partners) for the appellants.
Lum Chee Seng (Lum Chee Seng & Associates) for the respondent.

Abu Samah JCA:

[1] This is a dispute between the administrators over the administration of the estate of Soo Wan Yau @ Soh Get Swee ('deceased') involving two pieces of land held under CT No 1655, Lot 3454 and Grant No 14271, Lot 2211, in the township of Bandar Maharani, Muar, Johor ('the lands').

[2] The appellants (the plaintiffs in the court below) and the respondent are

joint administrators of the deceased estate. The letters of administration was granted to them by the High Court, Muar on 16 April 1979.

[3] They are also parties who have interests in the said lands. The first appellant is the deceased's lawful wife while the second appellant and the respondent are the deceased's children. The document of titles are with the respondent who had been in occupation of the said lands for years.

[4] The appellants preferred to sell the lands by way of a public auction and distribute the proceeds of sale of the lands among the beneficiaries in accordance with the Distribution Act 1958, after deducting the costs and related expenses. There was a verbal offer to the appellants to purchase the said lands for a sum of RM713,510. On 7 October 2004 the appellants, through their solicitors wrote to the respondent giving him the first option to purchase the lands at RM713,510, failing which they would apply to the High Court to sell the lands by public auction. Based on valuation reports in May 2005, the market value of Lot 2211 and Lot 3453 in May 2005 was RM224,000 and RM252,000 respectively. There was no response from the respondent to the letter from the appellants' solicitors.

[5] As the matter could not be resolved and had derailed the administration of the deceased's estate, the appellants filed an application by way of an originating summons at the Muar High Court for an order, inter alia, that the lands be sold by public auction and that the proceeds of the sale of the lands be distributed among the beneficiaries in accordance with the Distribution Act 1958.

[6] Six other children of the deceased have given their written consent to the application and agreed that the lands be sold by public auction. Two adopted children of the deceased, who were also named as beneficiaries, did not give their written consent to the application but they did not file any affidavit in opposition to the application.

[7] The respondent however opposed the application on the ground that he had been in occupation of the lands for years and that he wanted to buy the lands himself. He is still in occupation of one of the said lands. He had made known his intention to the appellants. There was however no response from the appellants. The respondent had even made an offer, through his solicitors, to purchase the lands at a total price of RM480,000, which was above the market value of the said lands but this was rejected by the appellants, as they believed that the lands could fetch a higher price if sold by way of public auction.

[8] On 17 July 2007 the learned judge dismissed the appellants' application on the ground, among others, that there was no concrete proof that there was

an offer to purchase the lands at RM713,510. That was not the end of the matter. The learned judge went a step further by ordering the appellants to sell the lands to the respondent at a total price of RM480,000 and to execute the memorandum of transfer in Form 14A within three months of the said order and that the sale proceeds be divided among the beneficiaries. Being dissatisfied, the appellants appealed to this court against the order directing them to sell the lands to the respondent rather than ordering the lands to be sold by public auction.

[9] The appellants contended that the learned judge went beyond the scope of their application by ordering the lands to be sold to the respondent rather than ordering the lands to be sold by public auction.

[10] We agree with the appellants that the learned judge, having dismissed their application for an order of sale of the lands by public auction went beyond the scope of the said application by ordering the lands to be sold to the respondent. Section 60(2) of the Probate and Administration Act 1959 empowers the High Court to make an order of sale without the concurrence of all the personal representatives. Section 60(4)(a) of the Act provides that an administrator may not sell any immovable property without the sanction of the court. The Federal Court in *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23; [1983] CLJ (Rep) 433 held that in an application for an order of sale by the administrators of the deceased estate, the duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the court will have to look into the facts and surrounding circumstances of the case ie whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. In *Ong Thye Peng v Loo Choo Teng & Ors* [2008] 4 MLJ 31; [2008] 1 CLJ 571, the Federal Court held that the trustees of the estate, just like the administrators, must act in the interest of all the beneficiaries. Their duty is to ensure that the estate of which they are trustees benefits as much as possible when they deal with trust property. In the instant appeal, the High Court ordered the lands to be sold to the respondent contrary to the relief sought by the appellants and against the wishes of the majority of the beneficiaries who supported the application that the lands be sold by public auction. There is no averment in the respondent's affidavit in opposition, that the lands be sold to him at RM480,000. He merely urged the court to dismiss the appellants' application. In our judgment, the court clearly went beyond the scope of the appellants' application in ordering the lands to be sold to the respondent after having dismissed the appellants' application for an order of sale by public auction. There was no evidence before the court to determine what was the best possible price at the time of making the order. In the circumstances of the case, such an order is legally unsustainable.

[11] We therefore allow the appeal by the appellants with cost, set aside the order of the High Court and substitute it with an order that the lands be sold by way of a public auction.

Appeal allowed with costs, the High Court's order set aside and lands ordered to be sold by way of public auction.

Reported by Ashok Kumar